ICLG

The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2014

7th Edition

A practical cross-border insight into litigation & dispute resolution work

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirman Vinge
Aivar Pilv Law Office
Allen & Overy LLP
Attorneys at Law Borenius Ltd.
AZTAN Law Firm
Banwo & Ighodalo
Blake, Cassels & Graydon LLP
Boga & Associates
Bouchaib Law Firm
Brian Kahn Inc. Attorneys
CASAHIERRO Abogados
"Chiuariu & Associates" Attorneys at Law
Clayton Lutz
CMS Reich-Rohrwig Hainz
Collora LLP
Cozen O'Connor
Debarliev, Dameski and Kelesoska Attorneys at Law
Dentons
Drinker Biddle & Reath LLP
Gibson, Dunn & Crutcher LLP
Gleiss Lutz
Hajji & Associés
Iwata Godo
King & Wood Mallesons SJ Berwin
Latournerie Wolfrom & Associés
M. & M. Bomchil
Macesic & Partners Law Offices
Motieka & Audzevičius
Oblin Melichar
Ovalle Ugarte & Letelier Abogados
Pinheiro Neto Advogados
Pittier, Almandoz y Eliaz, S.C.
Portilla, Ruy-Diaz y Aguilar, S.C.
Quinn Emanuel Urquhart & Sullivan, LLP
Sam Okudzeto & Associates
Schellenberg Wittmer
Shipman & Goodwin LLP
SIGNUM Law Firm
Skadden, Arps, Slate, Meagher & Flom LLP
Sysouev, Bondar, Khrapoutski SBH
Vasil Kisil & Partners
Wolff Gstöhl Bruckschweiger Advokaturbüro

CDR Commercial Dispute Resolution
GLG Global Legal Group

The International Comparative Legal Guide to: Litigation & Dispute Resolution 2014

GLG
Global Legal Group

Contributing Editor
Greg Lascelles, King & Wood Mallesons SJ Berwin

Account Managers
Edmond Atta, Beth Bassett, Maksim Dolgusev, Dror Levy, Maria Lopez, Florjan Osmani, Oliver Smith, Rory Smith

Sales Support Manager
Toni Wyatt

Sub Editors
Nicholas Catlin
Amy Hirst

Editors
Beatriz Arroyo
Gemma Bridge

Senior Editor
Suzie Kidd

Global Head of Sales
Simon Lemos

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Information Press Ltd
February 2014

ISBN 978-1-908070-89-0
ISSN 1755-1889

Strategic Partners

General Chapter:

Country Question and Answer Chapters:

USA – Washington, D.C.

Skadden, Arps, Slate, Meagher & Flom LLP

Gary A. Rubin

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Washington, D.C., got? Are there any rules that govern civil procedure in Washington, D.C.?

The District of Columbia's legal system has three primary attributes: (i) federal; (ii) common law; and (iii) adversarial.

"Federal" means that the District of Columbia is home to courts of both the United States (federal courts) and of Washington, D.C. (local courts). The federal courts are courts of limited jurisdiction and may hear only cases "arising under" the Constitution and laws of the United States (including bankruptcy cases and cases arising under international treaties), cases in which the United States or a federal agency is a party, admiralty cases, and certain cases involving parties who are citizens of different states (or a different country). Washington, D.C.'s, local courts are courts of general jurisdiction and may hear cases arising under the laws of the District of Columbia, as well as equity claims and common law causes of action arising from conduct occurring in or affecting the District of Columbia. Unlike the local courts of states of the United States, which derive their authority from the sovereignty of the states in which they sit, the local courts in Washington, D.C., derive their authority from the United States Congress, which under the United States Constitution, has jurisdiction over District of Columbia affairs.

"Common law" means that precedent handed down by a superior court is binding upon inferior courts unless the superior court overrules its precedent in the same case or a later case, or unless the legislature enacts a statute abrogating the precedent.

"Adversarial" means that litigated proceedings in Washington, D.C., are driven by the parties themselves. The courts (both federal and local) are neutral and do not take part in investigations of fact.

Civil-trial proceedings in the federal courts in Washington, D.C., are governed by the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Columbia. Civil-trial proceedings in the local courts are governed by the Superior Court Rules of Civil Procedure. The local courts also have specialised rules for particular proceedings like small-claims and family proceedings.

1.2 How is the civil court system in Washington, D.C., structured? What are the various levels of appeal and are there any specialist courts?

The federal trial court in Washington, D.C., that generally hears cases of first instance, both civil and criminal, is the United States District Court for the District of Columbia. Parties who have received an adverse judgment in the District Court may appeal of right to the United States Court of Appeals for the District of Columbia Circuit, which is the first-level federal appellate court. Parties who have received an adverse judgment from the Circuit Court may appeal to the highest federal appellate court, which is located in Washington, D.C., the United States Supreme Court. Appeals to the Supreme Court are not of right. Rather, parties wishing to appeal to the Supreme Court must petition it to issue a writ of *certiorari* to the Circuit Court to commence the appellate process. If the Supreme Court denies the petition, the Circuit Court's decision stands.

Specialist federal courts include the United States Court of Federal Claims (which hears claims for money against the United States), the United States Bankruptcy Court for the District of Columbia (which hears bankruptcy cases), the United States Tax Court (which hears disputes related to federal taxes), and the United States Court of International Trade (which hears some cases concerning international trade or customs).

The local court of general jurisdiction is the Superior Court of the District of Columbia. Parties who have received an adverse judgment in the Superior Court may appeal to the highest local court in the District of Columbia, the District of Columbia Court of Appeals.

The Superior Court has a number of specialist divisions within the court, including a small-claims division, a family-law division, a tax division, and a probate division.

1.3 What are the main stages in civil proceedings in Washington, D.C.? What is their underlying timeframe?

Proceedings in both the United States District Court and the Superior Court follow the same basic schedule:

- Plaintiff files and serves a complaint. In District Court, service generally must be made within 120 days after filing the complaint. In Superior Court, service generally must be made within 60 days.
- Defendant answers the complaint and states any affirmative defences, or asks the court to dismiss the complaint for a limited number of reasons, including the court's lack of jurisdiction or the plaintiffs' failure to assert

a claim for which the court can grant relief. Defendant files and serves any counterclaims against the plaintiff or any claims against any other parties. In District Court, the defendant generally must answer the complaint or ask for dismissal within 21 days of being served. As Washington, D.C., is the seat of the United States government, the District Court is the venue for numerous cases and types of cases against the federal government and its agencies. In these cases, the United States and its agencies and officers have 60 days in which to answer a complaint or ask for dismissal. In Superior Court, defendants generally must answer a complaint or ask for dismissal within 20 days after being served.

- Parties engage in extensive pretrial discovery, including serving written questions upon each other that the other must answer in writing, deposing each other's witnesses and experts, and producing documents. Pretrial discovery is the most time-intensive component of most litigation and frequently lasts from several weeks to several months.
- Based on the evidence adduced during discovery, parties file motions for partial or complete judgment.
- Trial, unless the court grants complete judgment. Trial can last from several hours for simple matters to several months for complex cases.
- Judgment.
- Appeal (if any).

1.4 What is Washington, D.C.'s, local judiciary's approach to exclusive jurisdiction clauses?

In United States jurisprudence, exclusive-jurisdiction clauses generally are called forum-selection clauses. This is because a court's jurisdiction to decide a case depends upon constitutional and statutory provisions; parties cannot contract to give jurisdiction to a court that does not have it. The District Court will enforce a forum-selection clause unless the party challenging the forum demonstrates that: (i) formation of the clause was tainted by fraud or overreaching; (ii) enforcement would effectively deprive the complaining party of his day in court or deprive him of any remedy; or (iii) enforcement would contravene a strong public policy of the forum state.

The Superior Court views forum-selection clauses as *prima facie* valid, and will enforce them unless doing so is shown by the party challenging the forum to be unreasonable under the circumstances.

1.5 What are the costs of civil court proceedings in Washington, D.C.? Who bears these costs?

The expense of civil proceedings is primarily driven by attorneys' fees, expert fees, and expenses associated with discovery, particularly electronic discovery and the production of electronic documents. Court costs are a relatively insignificant portion of the overall expense. The cost to file a civil action in District Court currently is $350; in Superior Court, the filing fee currently is $120. Under the "American rule" against fee shifting, parties generally bear their own costs of litigation. In some limited circumstances, however (e.g., as a sanction for filing a frivolous motion or in order to divide the costs of a burdensome discovery request fairly), a court may order one party to pay the other's costs.

1.6 Are there any particular rules about funding litigation in Washington, D.C.? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingency and conditional fees are permitted in civil proceedings. Contingency fees, which provide the attorney a straight percentage of the client's award, are common on the plaintiff side. On the defence side, attorneys typically charge an hourly fee, although defence attorneys increasingly are using "creative billing arrangements", involving some combination of an hourly and conditional fee based on the success of the overall case or of a particular motion.

As parties generally bear their own costs in civil litigation, courts generally do not require them to provide security for costs.

1.7 Are there any constraints to assigning a claim or cause of action in Washington, D.C.? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Claims and causes of action generally are freely assignable, and the assignee may prosecute the claim or cause of action standing in the place of the assignor.

The United States does not prohibit third-party funding of litigation ("third-party process funding" in some European parlance). Third-party funding is not yet commonplace in U.S.-based litigation, but the practice is growing, particularly in the intellectual-property arena. A debate regarding the ethical and public-policy ramifications of such funding is ongoing. In Washington, D.C., the efficacy of third-party litigation funding is questionable. The District of Columbia recognises the doctrines of maintenance and champerty (which at common law prohibited an officious intermeddler from maintaining another's lawsuit, particularly in exchange for a portion of any recovery), and, accordingly, a third-party funding contract found to be champertous under D.C. law would not be enforceable in Washington, D.C., by the funder against the plaintiff.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

As a general matter, plaintiffs engaging in private civil litigation need not comply with any formalities before initiating proceedings.

When a plaintiff seeks judicial review of an action by a federal government agency in District Court, however, the plaintiff first generally must demonstrate an "exhaustion of remedies". This means that a plaintiff generally must first petition the government agency from which the plaintiff seeks relief and participate in all subsequent proceedings before the agency, including pursuing any internal agency appeals, before the plaintiff will be permitted to seek relief from the District Court.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Generally, limitation periods are substantive, but are treated as an affirmative defence, which means that a defendant who wishes to

defeat a suit based on the expiration of a limitation period must plead and prove that the limitation period has expired. Sometimes, defendants may choose to waive the limitations defence as a strategic matter. For example, when a person is being investigated for a civil infraction by a federal government agency, the person may enter into a "tolling agreement" with the agency to temporarily toll the running of the limitation period in order to permit the agency additional time to complete its investigation and perhaps negotiate a consensual resolution before the agency must sue the person in court.

Limitation periods are created by statute and differ for different causes of action. At the federal level, the general limitation period for civil claims is four years after such claims accrue, except that securities-fraud claims may be brought within the earlier of five years after the violation, or two years after its discovery. A United States federal agency seeking to obtain a civil penalty in a District Court enforcement proceeding must bring the proceeding within five years of accrual, unless the period is tolled by agreement of the parties.

District of Columbia local law provides a number of varying limitation periods for different types of claims in Superior Court.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Washington, D.C.? What various means of service are there? What is the deemed date of service? How is service effected outside Washington, D.C.? Is there a preferred method of service of foreign proceedings in Washington, D.C.?

In both the federal and local court, civil proceedings are commenced by filing a complaint. A copy of the complaint, together with a summons commanding the defendant to appear and answer the complaint, is then served on the defendant.

A number of methods exist for serving process upon defendants, including personal service (hand delivery), mailing a copy of the summons and complaint to the defendant's address, leaving a copy of the summons and complaint at the defendant's residence, or delivering a copy of the summons and complaint to an agent for the defendant. Service may be effected upon a defendant located outside the United States as provided in any applicable treaty, or, if no treaty is in force, then as provided under local law or, unless prohibited by local law, by personally serving the defendant or mailing a copy of the summons and complaint to the defendant.

The defendant's time to appear is calculated from the date service is initiated by the plaintiff. Procedural rules provide the defendant additional time to appear when the plaintiff does not personally serve the defendant.

In District Court, in suits against a United States federal agency, the plaintiff must serve the agency by delivering a copy of the summons and complaint to the United States Attorney General, the United States Attorney for the District of Columbia, and the federal agency itself.

3.2 Are any pre-action interim remedies available in Washington, D.C.? How do you apply for them? What are the main criteria for obtaining these?

Pre-action remedies generally are not available because until a case is commenced, the court does not have power over the parties.

After service, the two most prevalent interim remedies are the temporary restraining order and the preliminary injunction. A temporary restraining order is a temporary injunction that the court may grant on an expedited basis (and, in an emergency, *ex parte*) that cannot last longer than 14 days if issued by the District Court, or 10 days if issued by the Superior Court.

A preliminary injunction is a temporary injunction that the court may also grant on a rapid basis (although not as quickly as a temporary restraining order). In District Court, for example, a party applying for a preliminary injunction must provide notice to the opposing party, which has seven days to respond, and the court must consider the application within 21 days.

A party applying for either a temporary restraining order or a preliminary injunction must submit, with the application, an affidavit setting forth facts showing why the applicant is entitled to the requested relief.

3.3 What are the main elements of the claimant's pleadings?

A plaintiff's pleading generally has three elements: (i) a short and plain statement of the case showing that the plaintiff is entitled to relief; (ii) a statement of the court's jurisdiction; and (iii) a prayer for relief. Courts historically have liberally construed this "notice pleading" standard and will not dismiss a complaint if it merely puts the defendant on notice of the basic allegations. In recent years, the Supreme Court has tightened these pleading requirements for federal cases, holding that a plaintiff's complaint must state a claim that is plausible on its face, meaning that the pleaded factual content must permit the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. In addition, some types of claims are by procedural rule subject to a higher pleading standard. Fraud claims, for example, must be pleaded with specificity.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings may be amended in both the federal and local court. In federal court, a party may amend a pleading once as of right within 21 days after serving it, or, if the pleading requires a response, within 21 days after the opposing party files a responsive pleading or motion. In local court, a party may amend a pleading once as a matter of right any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may amend at any time within 20 days after the pleading is served.

After this period passes, a party may amend a pleading only with the opposing party's consent or with leave of the court. The applicable procedural rules provide that the court should freely give leave "when justice so requires".

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In answering a complaint, a defendant must provide a short and plain statement of its defences to each claim asserted against it and must admit or deny the plaintiff's allegations. The defendant

may provide a general denial against all of the plaintiff's allegations or a group of allegations, or the defendant may specifically admit or deny each allegation. Where the defendant lacks sufficient knowledge to form a belief regarding the truth of an allegation, the defendant may so state, and this statement will be treated as a denial.

A defendant also must raise any affirmative defences in an answer. Affirmative defences are defences that must be proven by the defendant and that, if successful, would prevent the defendant from being liable on a claim even if all of the allegations asserted by the plaintiff are true (e.g., the statute of limitations has lapsed). In addition, the defendant may raise the following defences by motion: (i) lack of subject-matter jurisdiction; (ii) lack of personal jurisdiction; (iii) improper venue; (iv) insufficiency of process; (v) insufficiency of service of process; (vi) failure to state a claim upon which relief can be granted; and (vii) failure to join a necessary party.

In addition to affirmative defences, a defendant must also raise some "compulsory counterclaims" in its answer. Unlike an affirmative defence, a counterclaim seeks affirmative relief from the plaintiff. Compulsory counterclaims that must be raised in an answer are those that arise out of the same transaction or occurrence as the plaintiff's claim and do not require joining another party over whom the court does not have jurisdiction to adjudicate.

4.2 What is the time limit within which the statement of defence has to be served?

See question 1.3.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

A defendant may "implead" a third party who is or may be liable to the defendant for all or part of the claim against it by serving a summons and complaint on the third party.

In an action involving multiple defendants, a defendant may seek to pass on liability to its co-defendants by serving a "cross-claim" against those defendants.

4.4 What happens if the defendant does not defend the claim?

If a defendant fails to plead or otherwise defend against the plaintiff's claim, the plaintiff may ask the clerk of court to enter a default against the plaintiff. Upon entry of default, if the plaintiff's claim is for a sum certain (or a sum that can be calculated with certainty), the plaintiff may request that the clerk enter default judgment against the defendant. In all other cases, the plaintiff must ask the court to enter default judgment against the defendant.

In District Court, when the defendant is the United States, the court may enter default judgment only when the plaintiff establishes its right to relief by evidence that satisfies the court.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant may dispute both the court's jurisdiction over the subject matter of the dispute ("subject-matter jurisdiction") and the court's jurisdiction over the particular defendant ("personal jurisdiction"). A defendant may waive any challenge to the court's personal jurisdiction, but because a court may not hear a case over which it has no jurisdiction, a challenge to a court's subject-matter jurisdiction is non-waivable and may be raised at any time.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may be joined to proceedings as a plaintiff (or a defendant) if: (i) the third party asserts a right to relief (or a right to relief is asserted against it) relating to or arising out of the same transaction or occurrence as a claim in the proceeding; and (ii) any legal or factual question common to all plaintiffs (or defendants) will arise in the proceedings.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Where multiple actions involve a common question of law or fact, the court may join them for hearings or trials, consolidate them, or issue other orders to avoid unnecessary cost or delay.

In District Court, local rules also permit the court to designate proceedings as "related cases" where the earliest case is still pending on the merits and the cases: (i) relate to common property; (ii) involve common issues of fact; (iii) grow out of the same event or transaction; or (iv) involve the validity or infringement of the same patent. Related cases may be assigned to a single judge. The Superior Court has similar rules.

5.3 Do you have split trials/bifurcation of proceedings?

A court may order separate trials on any specific issues or claims as necessary to avoid unnecessary cost or delay.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Washington, D.C.? How are cases allocated?

In both District and Superior Courts, the civil clerk randomly assigns cases to the judges for all matters. Exceptions to this general rule include related cases (as discussed above in question 5.2), after-hours emergency motions that may be considered by a rotating designated judge, or, in Superior Court, particular types of cases that are assigned to calendars, rather than to specific judges.

6.2 Do the courts in Washington, D.C., have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Courts have broad power to manage cases before them. For example, courts may issue orders regarding scheduling for particular phases of the case (as discussed in question 1.3) or may

order parties to appear for pretrial conferences in order to move the case expeditiously toward resolution.

6.3 What sanctions are the courts in Washington, D.C., empowered to impose on a party that disobeys the court's orders or directions?

Courts may sanction parties or their attorneys for making misrepresentations to the court, failing to comply with court rules or orders, or making frivolous arguments. Sanctions may be monetary or non-monetary. Less severe sanctions for filing a frivolous motion, for example, include a court admonishing counsel or a party on the record in open court or ordering counsel or a party to pay opposing counsel's expenses in responding to the motion. Severe sanctions for failure to engage in discovery, for example, include directing the jury to infer that whatever materials were not produced in discovery would have been adverse to the party, had it produced them. The most drastic sanction a court may impose is to direct entry of judgment against a party.

6.4 Do the courts in Washington, D.C., have the power to strike out part of a statement of case? If so, in what circumstances?

A court may strike from a pleading an insufficient defence or any redundant, immaterial, impertinent, or scandalous matter.

6.5 Can the civil courts in Washington, D.C., enter summary judgment?

A court may grant summary judgment against a party when, construing all facts against the moving party (or, when a defendant moves for summary judgment before answering the plaintiff's complaint, construing all allegations in the complaint as true), the court determines that no genuine issue of material fact is in dispute between the parties and the moving party is entitled to judgment as a matter of law.

In District Court, in cases of judicial review of government agency action, the District Court may grant summary judgment if it determines as a matter of law that the evidence in the agency's administrative record could not permit the agency to take the action it took.

6.6 Do the courts in Washington, D.C., have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A court may discontinue or stay proceedings under its inherent power to control the cases before it in order to maximise judicial economy.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Washington, D.C.? Are there any classes of documents that do not require disclosure?

Voluminous discovery is a hallmark of litigation in the United States. Generally, a party may obtain discovery regarding any non-privileged matter that is relevant to the claim or defence of any party, including the existence, description, nature, custody, condition, and location of any materials (including paper and electronic records) and the identity and location of persons having knowledge of any discoverable matter. Such relevant information need not be admissible at the trial so long as the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Documents that are protected from disclosure include those that are privileged or subject to the attorney work product doctrine, as described in question 7.2.

Currently, the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, which proposes amendments to the procedural rules governing federal courts, is considering draft rules that would limit the scope of discovery.

7.2 What are the rules on privilege in civil proceedings in Washington, D.C.?

A privilege is the right of one party not to disclose a communication to another party. It offers a greater protection than mere confidentiality in that a court may order a party to disclose a confidential communication, but generally cannot order a party to disclose a privileged communication, unless the privilege has been waived. The most commonly asserted privilege in civil litigation is the attorney-client privilege, which protects communications: (i) between a client and an attorney; (ii) made for the purpose of seeking or providing legal advice; (iii) made in confidence and with an intent that it remain in confidence; and (iv) as to which the privilege has not been waived. The attorney-client privilege generally is waived whenever a communication is shared with a person who is not within the privileged relationship.

Another frequently used protection against disclosure in litigation, although technically not a privilege, is the attorney work product doctrine. Work product is: (i) a document or tangible thing; (ii) made by a party or the party's representative; and (iii) in anticipation for litigation. Although work product generally is protected from disclosure, a court may order a party to produce work product if it is otherwise discoverable and if the party requesting discovery shows that it has substantial need for the work product to prepare its case and cannot, without undue hardship, obtain its substantial equivalent by other means. If the court does order discovery of work product, it must protect against any disclosure of the mental impressions, conclusions, opinions, or legal theories of the producing party's attorney or other representatives concerning the litigation.

7.3 What are the rules in Washington, D.C., with respect to disclosure by third parties?

The court may issue a subpoena, which must be served formally upon the third party, which brings the third party within the court's power for the purpose of requiring it to participate in discovery. Parties who wish to take discovery from third parties may request that the court issue a subpoena and serve it upon the third party, together with a discovery request, usually a request for production of documents or a request to depose the third party.

7.4 What is the court's role in disclosure in civil proceedings in Washington, D.C.?

Courts generally do not participate actively in discovery, except to resolve disputes that may arise between the parties (including

disputes over privilege or a party's refusal to engage in discovery). The District Court, at the outset of discovery, typically will issue orders, which usually have been stipulated to by the parties in advance, that specify the format and timing of document production, the dates for certain types of depositions, the treatment of confidential or privileged materials, and, importantly for scheduling trial, the date by which discovery must be completed.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Washington, D.C.?

Both the District Court and the Superior Court may restrict a receiving party's use of documents in order to protect the producing party from annoyance, embarrassment, oppression, or undue burden or expense.

8 Evidence

8.1 What are the basic rules of evidence in Washington, D.C.?

The District Court and the other federal courts are subject to the Federal Rules of Evidence. Washington, D.C., does not have codified rules of evidence. Instead, the Superior Court relies on the Rules of Civil Procedure and relevant statutory and case law as the rules of decision for evidence issues.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

"Relevant evidence", which is any evidence that tends to make a material fact more or less probable, is generally admissible. The court may, however, exclude relevant evidence if its probative value is outweighed by the likelihood that the evidence will unfairly prejudice a party, confuse or mislead the jury, delay the case, or be needlessly cumulative of other evidence. Evidence that is not relevant is inadmissible.

With respect to expert testimony, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify if: (i) the expert's specialised knowledge will help the fact-finder to understand the evidence or to determine a fact; (ii) the testimony is based on sufficient facts or data; (iii) the testimony is the product of reliable principles and methods; and (iv) the expert has reliably applied the principles and methods to the facts of the case.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Generally, a witness may only testify regarding matters within the witness's personal knowledge.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Recent amendments to the Federal Rules of Civil Procedure, applicable in District Court, provide work product protection to most communications between an attorney and an expert witness, including drafts of expert reports.

Expert witnesses are retained by parties to testify on such parties' behalf, and civil cases in the United States often feature "dueling experts" who have been retained by each of the plaintiff and the defendant. Like all witnesses, however, experts must testify truthfully.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Washington, D.C.?

In a non-jury trial, the court determines what evidence is admissible and then weighs that evidence in making its conclusions of fact. In a jury trial, the court determines what evidence is admissible (i.e. what evidence the jury may hear), and the jury weighs the evidence in rendering its verdict.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Washington, D.C., empowered to issue and in what circumstances?

Both the Superior Court and the District Court serve as both courts of law and courts of equity and can grant both legal and equitable relief. In particular, courts can award money damages (legal relief), including compensatory damages in both contract and tort cases, and, in tort cases only, punitive damages. In addition, courts can issue injunctions (equitable relief) prohibiting a party from taking certain actions or, particularly in property disputes, enjoining the party to comply with the terms of a binding contract (specific performance). In addition, a court can declare a party's rights under a contract or statute (declaratory relief).

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

As discussed in question 9.1, courts can order defendants to pay damages. Courts are also empowered to order parties to pay pre- and post-judgment interest on damages. Pre-judgment interest compensates a party for the time value of its money judgment and is thus often not granted in cases where the party's right to payment is not fixed or liquidated until the fact-finder determines liability and damages.

With respect to the costs of litigation, as noted in question 1.5, parties generally bear their own costs.

In addition, in civil enforcement proceedings brought by a federal agency in District Court, the District Court has the power to impose statutory civil penalties on defendants. Further, under its equitable powers, the District Court may also order defendants to "disgorge" ill-gotten gains in cases arising from defendants' business conduct (similar to skimming).

9.3 How can a domestic/foreign judgment be enforced?

The United States is not party to any treaty regarding enforcing judgments issued by the courts of foreign nations, and enforcement accordingly is generally a matter of state law. The District of Columbia has enacted a version of the Uniform Foreign-Country Money Judgments Recognition Act, which

provides for recognition of final foreign-country judgments so long as they are rendered by an impartial court with personal and subject-matter jurisdiction over the case. Recently enacted federal legislation prohibits courts in the United States from enforcing foreign libel judgments unless they comply with the First Amendment to the United States Constitution, which prohibits government abridgment of the freedom of speech.

A party seeking to enforce a judgment issued in the United States may file a copy of such judgment with the clerk of the District Court or of the Superior Court to initiate federal or local enforcement, respectively.

9.4 What are the rules of appeal against a judgment of a civil court of Washington, D.C.?

A party who has suffered an adverse judgment in District or Superior Court may appeal, respectively, to the United States Court of Appeals for the District of Columbia Circuit or to the District of Columbia Court of Appeals, as discussed in question 1.5.

To appeal an adverse judgment of the District Court, the appellant must file a "notice of appeal" with the District Court clerk. Both parties then file with the clerk a statement of the issues the Circuit Court should consider and what portions of the District Court record the Circuit Court should review. When these filings are complete, the clerk of the District Court transmits the case to the clerk of the Circuit Court for docketing. Appeals are governed by the Federal Rules of Appellate Procedure.

Appellants appealing a decision of the Superior Court to the District of Columbia Court of Appeals follow a similar procedure. The Rules of the District of Columbia Court of Appeals govern appeals in that court.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Washington, D.C.? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration and mediation are the two most common forms of alternative dispute resolution.

Mediation involves continuous discussions among the parties, facilitated by a neutral person called a mediator, with the goal of achieving a consensual resolution. Mediation, by its nature, is a non-binding form of dispute resolution.

Arbitration is an adversarial proceeding before a neutral party called an arbitrator. The proceeding follows rules agreed upon in advance by the parties. At the end of the proceeding, the arbitrator issues his decision, which can be binding or non-binding, as agreed by the parties in advance.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

As the parties' consent is the hallmark of alternative dispute resolution, the rules governing such proceedings can vary from case-to-case, depending upon the agreement of the parties. Typically, parties who have agreed to arbitrate their dispute will subject themselves to pre-existing rules promulgated by an arbitration institution. In cases of mediation, individual mediators often select the procedures that will govern the mediation.

1.3 Are there any areas of law in Washington, D.C., that cannot use Arbitration/Mediation/ Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Alternative dispute resolution generally is inappropriate in criminal cases and civil enforcement proceedings brought by government agencies.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court - pre or post the constitution of an arbitral tribunal - issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Washington, D.C., in this context?

In 1989, the District Court launched the United States District Mediation Program, which is designed to give litigants an opportunity to discuss the settlement of their claims with the help of a neutral third party who is a specially trained member of the District of Columbia Bar. The District Court's Mediation Program is free to parties who wish to use it, is non-public, and, under certain circumstances, could result in faster resolutions than in-court litigation. If the parties request, the District Court may stay their litigation and order them to mediation. The District Court has appointed a Dispute Resolution Compliance Judge to enforce the court's mediation rules and any orders of the court referring the parties to mediation. The Dispute Resolution Compliance Judge may sanction parties to ensure compliance.

With respect to arbitration, the District Court generally will enforce an agreement between the parties to arbitrate if it finds that: (i) the parties entered into a valid and enforceable arbitration agreement; and (ii) the arbitration agreement encompasses the claims at issue. The court will stay a case before it pending arbitration if it finds that the parties have agreed to arbitrate.

The Superior Court also has an alternative dispute resolution programme called the Multi-Door Dispute Resolution Division. This division helps parties settle disputes through mediation, arbitration, case evaluation, and conciliation.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Washington, D.C., in this context?

As noted in question 1.1, alternative dispute resolution may be binding or non-binding. Under the Federal Arbitration Act, if the parties have agreed to binding arbitration, they may ask the District Court to enter judgment upon the arbitrator issuing an

award. The court must enter the judgment unless it decides instead to vacate or modify the award.

A party may ask the District Court to vacate an arbitral award: (i) where the award was procured by fraud; (ii) where the arbitrator was evidently corrupt; (iii) where the arbitrator committed misconduct by refusing to postpone the hearing, in refusing to hear evidence material to the controversy, or that otherwise prejudiced a party; or (iv) where the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final, and definite award was not made.

A party may ask the District Court to modify an arbitral award: (i) where the arbitrator evidently materially miscalculated any figures or made a material mistake in describing any fact identified in the award; (ii) where the arbitrator has awarded upon a matter not submitted to by the parties; or (iii) where the award is imperfect in a manner not affecting the merits of the controversy.

Importantly, these actions do not constitute an appeal of the arbitrator's award. As parties cannot give jurisdiction to a court by contract, they cannot ask a court to review a contracted-for arbitral award. They may, however, challenge judicial recognition of an arbitral award on the grounds noted above, because the existence of these grounds would vitiate their contractual obligation to comply with the arbitrator's award.

In the Superior Court's Multi-Door arbitration programme, if the parties agree to binding arbitration, the arbitrator's decision is final and becomes a judgment of the court.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Washington, D.C.?

The United States does not utilise formalised alternative dispute resolution schemes, as are common in many European countries. A number of private alternative dispute resolution oganisations have a presence in Washington, D.C. As noted in question 1.2, parties may elect to use neutrals supplied by or following rules promulgated by these organisations. One of the largest such organisations in Washington, D.C., is JAMS.

2.2 Do any of the mentioned alternative dispute resolution mechanisms provide binding and enforceable solutions?

Whether an alternative dispute resolution proceeding is binding is a matter of consent for the parties, as noted in questions 1.1 and 1.5.

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

In January, 2012, the U.S. Court of Appeals for the District of Columbia Circuit decided a case regarding whether arbitrators may determine challenges to their own jurisdiction. This issue was intensely debated in U.S. courts in 2012 and remained a hot topic in 2013. Generally, courts decide this issue by determining whether the parties have agreed to submit the threshold question of arbitrability to the arbitrator. If they have, courts apply the same deferential standard of review applicable to other matters the parties agreed to arbitrate. However, if the parties did not agree to submit this threshold to arbitration, the question of whether the dispute is arbitrable is subject to independent review by the courts. In *Republic of Argentina v. BG Group PLC*, the District of Columbia Circuit Court vacated a damages award rendered by an arbitration tribunal under the United Kingdom-Argentina Bilateral Investment Treaty because the claimant had not first litigated its grievances in the Argentine courts, as the treaty required. The Circuit Court held that the tribunal had exceeded its powers by ignoring this jurisdictional limitation. In July 2012, BG Group petitioned the United States Supreme Court for a writ of *certiorarti* to review whether an arbitrator may determine whether a precondition to arbitration has been satisfied, which the court granted in June 2013. The Supreme Court held oral argument in December 2013, and a decision is pending.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those alternative dispute resolution methods in Washington, D.C.

Many of the most high-profile cases in Washington, D.C., are major criminal cases brought by the Department of Justice, or civil enforcement proceedings brought by federal agencies like the Securities and Exchange Commission, which are not appropriate for alternative resolution. As a result, alternative dispute resolution is less commonplace than it might otherwise be, given the size of court dockets.

Congress has, however, determined that some disputes involving the United States government should be subject to alternative dispute resolution. In 1996, Congress enacted the Administrative Dispute Resolution Act, which authorises federal agencies to resolve disputes through non-litigated proceedings. In 1998, the President appointed a working group of agencies, led by the United States Attorney General, to develop administrative dispute resolution programmes for workplace disputes, contracts and procurement disputes, regulatory enforcement disputes, and claims against the government. The working group reports that a number of federal agencies have adopted and are utilising alternative dispute resolution programmes for these types of cases, and that these programmes provide an efficient alternative to in-court litigation.

Gary A. Rubin

Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue
Washington, D.C., 20005
USA

Tel: +1 202 371 7000
Fax: +1 202 393 5760
Email: gary.rubin@skadden.com
URL: www.skadden.com

Gary A. Rubin, a counsel in the firm's Washington, D.C., Litigation and Government Enforcement Group, represents individuals and domestic and foreign companies in civil and criminal investigations, complex litigation, and parallel proceedings involving private litigants and state, federal, and foreign regulators and prosecutors. Mr. Rubin also represents debtors, creditors, financial advisors, targets and acquirers in litigated proceedings in and related to Chapter 11 bankruptcy cases. In addition, he represents companies and individuals in complex civil litigation in both state and federal courts at both the trial and appellate levels.
He frequently addresses conflicts of laws, cross-border discovery issues, and data-protection issues.

Skadden
Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

The Litigation Group of Skadden, Arps, Slate, Meagher & Flom LLP and affiliates comprises approximately 600 attorneys throughout the firm's offices worldwide, and Skadden attorneys are admitted to practice throughout the United States, as well as in more than 30 other countries and territories. Our international experience and numerous multilingual attorneys enable us to effectively represent non-U.S. plaintiffs and defendants in U.S. judicial proceedings. We represent clients in trial and appellate courts at the federal and state level, before administrative tribunals, and in arbitrations and other dispute resolution proceedings. We also represent clients in proceedings involving government agencies, such as the Securities and Exchange Commission, the U.S. Attorney General's Office, the Financial Industry Regulatory Authority, the New York Stock Exchange, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Department of Housing and Urban Development, the U.S. Patent and Trademark Office, the U.S. Department of Labor and the Internal Revenue Service.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities & Trade Law
- Competition Litigation
- Construction & Engineering Law
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk